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In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 867

PACIFIC CEMENT AND AGGREGATES, INC.,
Petitioner,

vs.

CALIFORNIA BANK, BANK OF AMERICA N. T. & S. A. and CROCKER-ANGLO NATIONAL BANK,
Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PARKER PRINTING COMPANY

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vs.

CALIFORNIA BANK, BANK OF AMERICA N. T. & S. A. and CROCKER-ANGLO NATIONAL BANK,
Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The petitioner Pacific Cement and Aggregates, Inc. prays that a writ of certiorari be issued to review the decision of the United States Court of Appeals for the Ninth Circuit in the above case.

OPINIONS BELOW

The opinion of the United States District Court for the Northern District of California, Southern Division, denying

petitioner's motion for an order to effectuate and protect a final reorganization decree (R. 50-54)* and the opinion of that court denying petitioner's motion for reconsideration (R. 81-83) have not been reported. The opinion of the United States Court of Appeals for the Ninth Circuit (App. 1-10)* is reported in 273 F.2d 628.

JURISDICTION

The judgment of the United States Court of Appeals was entered on November 13, 1959. (App. 11.) A petition for rehearing was filed on January 12, 1960, within the time allowed, and denied on January 29, 1960. (Tr. 113.)* The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1), 62 Stat. 928.

QUESTION PRESENTED

Can a court refuse to enforce in accordance with their terms the *res judicata* orders of a reorganization court concerning surrender and exchange of securities?

STATUTES INVOLVED

The statute directly involved is Section 77B of the Bankruptcy Act, 48 Stat. 912, 11 U.S.C. § 207 (1934), and particularly subsections (b), (f), (g) and (h) thereof. (App. 11-13.) A determination of the question presented will have equal applicability to confirmation orders and final decrees entered under Chapter X of the Bankruptcy Act which supersedes, but is based on, former Section 77B. 11 U.S.C. §§ 604, 624, 628; 52 Stat. 894, 898, 899. (App. 14-15.)

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*"R." refers to the printed record in the Court below. "Tr." refers to the typewritten transcript of Volume II of the record in the Court below. "App." refers to the appendix to this petition.

STATEMENT OF FACTS

Petitioner is a corporation which was reorganized in proceedings under former Section 77B of the Bankruptcy Act. Prior to the reorganization proceedings, holders of most of petitioner's bonds and debentures (then in default) became parties to protective agreements and received certificates of deposit upon depositing their securities with depositary banks. Debt readjustment agreements were thereupon entered into between petitioner and the protective committees but they proved to be of no avail (R. 8-10). In 1934 petitioner adopted a plan of reorganization which provided for the exchange of all old securities for one class of new common stock (R. 15-18).

The Order Confirming Plan of Reorganization, dated December 17, 1934, in Sections 54 and 55 required the holders of certificates of deposit to surrender them to the issuing depositary as a condition of exchange of the deposited bonds and debentures for new common stock. Section 54 of the Order specifies the following procedure for surrender of certificates of deposit representing deposited bonds:

> "54. That holders of Certificates of Deposit issued under the Protective Agreement dated December 1, 1931, with respect to bonds, **are hereby authorized and directed to surrender certificates of deposit to the Depositary which issued the same** and each of said Depositaries under the above-mentioned Protective Agreement is authorized and directed to forward the bonds represented thereby to The Anglo California National Bank of San Francisco, as Trustee under the Trust Indenture securing said bonds, for cancellation upon the issuance of certificates representing Common stock of the Debtor issuable under said Plan. **That each of said Depositaries shall certify to said The Anglo California National Bank of San Francisco, as Trustee, the names and addresses of holders of bonds evidenced by such certificates of deposit so surrendered for can-**

cellation and the face amount owned by each such holder. That said Trustee shall notify said Transfer Agent to issue the appropriate number of shares of Common stock issuable under said Plan in the names of such owners and holders and the Transfer Agent shall thereupon issue the same, cause the name of the record owner and holder and the address and number of shares to be entered in its transfer books and such shares to be registered and returned to the Trustee, which shall forward the same to the Depositary from which such bonds were received. That said The Anglo California National Bank of San Francisco, as Trustee, upon the issuance of said shares of stock shall cancel all such bonds as hereinbefore provided." (R. 25-26; emphasis supplied.)

Section 55 of the Order specifies an identical procedure for the surrender of certificates of deposits representing deposited debentures except that a different bank is the indenture trustee to whom the deposited debentures are to be surrendered (R. 26-27).

Under the "bar order" of Article VIII of the Final Decree, dated March 23, 1936, unless all old securities were surrendered **by their owners** for cancellation and exchange within ten years, they became void and any shares of new common stock (and accumulated dividends) then held in trust to effectuate an exchange were to be returned to petitioner (R. 36-39). The provisions of Article VIII are printed in the appendix to this petition at pp. 15-18.

Upon the expiration of the bar order period, certificates of deposit representing $3,000 of old bonds and $12,000 of old debentures had not been surrendered by their owners to the issuing depositary for exchange in accordance with the directives of Sections 54 and 55 of the Confirmation Order (R. 43-44). Petitioner, by motion in the District Court, sought to recover the 768 shares of new common stock and

accumulated dividends thereon which had never been exchanged for the unsurrendered certificates of deposit (R. 40-41). The motion for enforcement of the bar order was denied by the District Court (R. 50-54, 81-83) and the Court of Appeals affirmed (App. 1-11).

REASONS FOR GRANTING THE WRIT

I. The Refusal of the Courts Below to Enforce the Confirmation Order and Final Reorganization Decree Conflicts with Decisions of the United States Supreme Court.

The courts below have refused to enforce Sections 54 and 55 of the Order Confirming Plan of Reorganization and the bar order of the Final Decree in accordance with their terms. Such refusal is in direct conflict with decisions of the United States Supreme Court holding that reorganization court orders and decrees are res judicata and must be enforced in accordance with their terms.

Chicot County Drainage Dist. v. Baxter State Bank, 308 U.S. 371 (1940);

Prudence Realization Corp. v. Ferris, 323 U.S. 650 (1945).

In the *Prudence Realization Corp.* case, *supra*, at 656, this Court said that when the parties to a Section 77B reorganization proceeding came before a court seeking a determination of their present rights under an order confirming a plan of reorganization, "that court was obliged to ascertain whether any rights had been fixed by the reorganization plan, and, if so, to enforce them."

In the *Chicot County Drainage Dist.* case, *supra*, this Court held that a decree of a bankruptcy court canceling old bonds not presented for payment within the time specified was res judicata even though the particular statute there involved was later declared unconstitutional.

In the present case there was no basis whatever for refusing to enforce the order confirming plan of reorganization and the bar order of the final decree. Certificates of deposit for the old bonds and debentures in issue had not been surrendered to the depositary as directed by Sections 54 and 55 of the Order Confirming Plan of Reorganization (See pp. 3-4, *supra*). The courts below ignored that requirement of the Order and refused to give it any effect.

The courts below held that the depositary of the bonds and debentures, in violation of the directive of the Order, could lawfully "surrender" the bonds and debentures for exchange on behalf of the owners who failed to surrender their certificates of deposit as directed by the Order. This holding, in effect, rewrites the Order to make it unnecessary for certificates of deposit ever to be surrendered.

Subsection (g) of Section 77B expressly makes the provisions of the plan of reorganization and of the order of confirmation binding on all creditors. This Court in the *Prudence Realization Corp.* case, 323 U.S. at 655, stated, "The rights are thus fixed as the plan and the order provide, and are not otherwise affected." The courts below disregarded that holding and permitted the rights of holders of certificates of deposit to be preserved by the unauthorized "surrender" of the underlying bonds and debentures by the depositary. The unauthorized "surrender" by the depositary did not meet the requirement of the Final Decree that the "owners and holders" themselves surrender their securities in accordance with the Order Confirming Plan of Reorganization within the ten year bar order period. (App. 16-18.) Thus, the courts below refused to treat the Order and the Final Decree as *res judicata*. The effect of the judgment is to revive the rights of unsurrendered certificates of deposit which had become void under the bar order and to deprive petitioner of its rights under the bar

order to a return of the unclaimed shares of stock and accumulated dividends.

It should also be observed that there was no factual basis for the courts below to find a "surrender" of the bonds and debentures by the depositary. All that the depositary did was to deliver possession of such securities to the indenture trustees for convenience and safekeeping (R. 56-57, 72) under instructions that such securities were "not to be cancelled or otherwise dealt with except under instructions which we will hereafter send you from time to time" (R. 74, 76; App. 8). No instructions were thereafter given to cancel and exchange the bonds and debentures here involved for the simple reason that the certificates of deposit were never surrendered to the depositary (R. 56-57). Thus, the depositary's delivery of possession was not a "surrender" under Sections 54 and 55 of the Confirmation Order and the finding of "surrender" is in conflict with the opinion of this Court in *Evans v. United States*, 153 U.S. 584, 591 (1894), where it was stated, "Indeed, the word 'surrender' carries with it something more than a bare delivery, and indicates a transfer of title as well as of possession."

II. The Proper Disposition of This Case Involves an Important Question of Law Which Should Be Settled by This Court.

The question here is whether a federal court by denying the res judicata effect of a confirmation order can do indirectly what it could not do directly, that is, vacate a bar order after its expiration date. The decision below introduces uncertainty in an important area of judicial administration of bar orders entered in reorganization proceedings and conflicts in principle with decisions from other circuits. Prior to this case it was generally understood that a federal court lacked power to open up a bar order after its expiration to permit barred claims to be revived.

Duebler v. Sherneth Corp., 160 F. 2d 472 (2nd Cir. 1947);

In re Peyton Realty Co., 148 F. 2d 771 (3rd Cir. 1945);

North American Car Corp. v. Peerless Weighing & Vending Machine Corp., 143 F. 2d 938 (2nd Cir. 1944);

In re Tom Moore Distillery Co., 52 F. Supp. 938 (W. D. Ky. 1943).

The reason for refusing to permit a vacation of a bar order after its expiration date was expressed in the *Peyton Realty Co.* case as follows:

> "* * * It is just as important that there should be a place to end, as it is that there should be a place to begin litigation. There comes a time in all litigation when the order of the court is final, and we think legislative intent to this effect was given by [Section 207, Subsection h] of the Act. If sanction is given to the vacation of this decree, there is no assurance that the owners of the remainder of the securities not exchanged, will not present their applications for consideration as was done here." (148 F. 2d at 773)

It has been aptly said, "If some limit is not placed upon the time within which creditors' rights are barred, a bankrupt estate could never be settled." *In re Detroit Leland Hotel Co.*, 61 F.Supp. 686, 687 (E.D. Mich. 1945), aff'd. 153 F.2d 715 (6th Cir. 1946).

In the instant case the whereabouts of the holders of unsurrendered certificates of deposit is unknown (R. 48, 49.) No justification has been offered for their default in failing to surrender their securities for cancellation and exchange for new common stock within the ten year bar order period.

To leave the door open for unknown holders of unsurrendered securities (presumably abandoned) to press a

claim against a reorganized corporation years later is to invite needless litigation that would burden court calendars, harass the corporation and impose a perpetual trust on shares which in all likelihood will never be claimed.

> "Stale claims, set up long after the final decree in reorganizations under [Section 77B], are very rigidly to be discouraged."
>
> *Piedmont Ice & Coal Co. v. American Service Co.*, 130 F.2d 78, 80 (4th Cir. 1942).

Even where no "cut off" date for exchange has been specified in a final decree, it has been held that a reorganization plan should not be construed as creating a perpetual trust fund for the purposes of making the exchange. *In re Fox Metropolitan Playhouses, Inc.*, 85 F.Supp. 128 (S.D. N.Y. 1949).

The decision below cannot be justified on the dictum of the Court of Appeals (App. 10) that the bar order might be construed as not applying to the bonds and debentures deposited under the protective agreements prior to the reorganization proceedings. Such a discriminatory interpretation of the bar order would raise serious questions as to the validity of the bar order and as to the denial of equal protection of the laws. Suffice it to say the bar order expressly applies to "all" of petitioner's old securities (App. 18) which precludes any exception for bonds and debentures on deposit under the 1931 protective agreements.

This Court should not countenance an inroad on the jurisdiction of a reorganization court based on an assertion that the rights of parties to a protective agreement survive a confirmed plan of reorganization. The statute itself makes the provisions of the plan and of the order of confirmation binding upon "all creditors, secured or unsecured, whether or not affected by the plan, and whether or not their claims shall have been filed, and, if filed, whether or not approved,

including creditors who have not, as well as those who have, accepted it." 48 Stat. 920, 11 U.S.C. § 207(g) (1934). (App. 12.) Similar language is found in Chapter X. 52 Stat. 898, 11 U.S.C. § 624. (App. 14.)

A reorganization court "may disregard any limitations or provisions of any depositary agreements". 48 Stat. 915, 11 U.S.C. § 207(b) (1934). (App. 12.) The imposition of reasonable requirements upon parties to protective agreements has been upheld.

In re Witherbee Court Corp., 88 F.2d 251, 256 (2nd Cir. 1937).

In the instant case, by requiring the surrender of certificates of deposit as a condition of exchange for new common stock the reorganization court imposed reasonable requirements that limited the rights of creditors under the protective agreements. The order is res judicata. If it were otherwise, creditors by private agreement could preserve their rights indefinitely and thereby hamstring the effective consummation of a reorganization proceeding.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be granted.

GEORGE A. BLACKSTONE
Attorney for the Petitioner

HELLER, EHRMAN, WHITE & MCAULIFFE
Of Counsel

CERTIFICATE OF SERVICE

The undersigned, a member of the bar of the United States Supreme Court representing petitioner, does hereby certify that, in compliance with paragraph 1 of Rule 33 of Revised Rules of the Supreme Court of the United States, he served a copy of the foregoing petition for certiorari on each adverse party by mail by depositing the same on this date in a United States mail box in San Francisco, California, with first class postage prepaid, addressed as follows to each counsel of record at his post office address:

Donald O. Welton, Esq.
629 South Spring Street
Los Angeles 2, California

C. Thorne Corse, Esq.
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San Francisco, California

Dated this 13th day of April, 1960.

GEORGE A. BLACKSTONE
George A. Blackstone
Attorney for Petitioner

(Appendix Follows)

Appendix

United States Court of Appeals for the Ninth Circuit

No. 16,280—Nov. 13, 1959

Pacific Cement and Aggregates, Inc.,
Appellant,

vs.

California Bank, Bank of America N. T. & S. A., and Crocker-Anglo National Bank,
Appellees.

On Appeal from the United States District Court for the Northern District of California Southern Division

OPINION

Before: CHAMBERS, HAMLIN and MERRILL, Circuit Judges.

HAMLIN, Circuit Judge

On October 31, 1934, Pacific Cement and Aggregates, Inc., appellant, filed its petition and Plan of Reorganization under former Section 77B of the Bankruptcy Act, 48 Stat. 912, 11 U.S.C.A. § 207 (1934). Thereafter, on December 17, 1934, the District Court for the Northern District of California, Southern Division, entered its Order confirming the Plan of Reorganization, and on March 23, 1936, entered its Final Decree in the proceeding.

On March 26, 1958, appellant filed a "Notice of Motion for Order to Effectuate and Protect the Final Decree." On June 11, 1958, the District Court entered an order denying

this motion and later denied a motion for rehearing. The District Court had jurisdiction to entertain the motion under *Shores v. Hendy Realization Co.* (9 Cir. 1943) 133 F.2d 738, and this court has jurisdiction of the timely appeal under 28 U.S.C.A. § 1291.

The appellees are Crocker-Anglo National Bank (formerly known as The Anglo California National Bank of San Francisco), California Bank (formerly known as California Trust Company) and Bank of America National Trust & Savings Association. The appellees will be referred to as "Anglo Bank," "California Bank" and "Bank of America." Appellant was formerly known as "Pacific Coast Aggregates, Inc.," and will be referred to as "Debtor."

Prior to institution of the Section 77B reorganization proceedings Debtor was in default in interest and sinking fund payments on its First Mortgage 6½% Sinking Fund Gold Bonds (called "bonds") and its Sinking Fund 7% Convertible Gold Debentures (called "debentures"). Holders of most of the bonds and debentures deposited their securities with certain depositaries (including California Bank) under two Protective Agreements, each dated December 31, 1931, relating to the bonds and debentures, respectively. Certificates of deposit were issued by the depositaries to the depositors as evidence of ownership of their deposited bonds and debentures.

Each of the Protective Agreements gave to a Protective Committee full control of the securities, including the right to transfer title to itself. Each Committee was authorized to assent on behalf of the security holder to any agreement, compromise or settlement, and if the Committee approved any plan or agreement, a copy thereof was to be filed with each depositary and notice given the depositors. Each

depositor was authorized to dissent from the plan by giving written notice thereof to the depositary within fifteen days. If the majority of the depositors did not dissent, the Committee had power to declare such plan or agreement operative and binding on all depositors who had not signified their intention to withdraw.

Debtor adopted a Plan of Reorganization which was approved by the Protective Committees. Notice of adoption of the Plan was given as provided, and a small percentage of the bond and debenture holders withdrew. Those who left their bonds and debentures on deposit were deemed to have adopted and consented to the Plan, which was subsequently confirmed by the Court.

The Plan provided for exchange of all old securities for one class of new common stock, and the Order confirming the Plan specified the procedure for surrender and cancellation of all old securities in exchange for new common stock.

The Order provided that certificates representing the shares due the bondholders were to be delivered to Anglo Bank and certificates representing the shares due the debenture holders were to be delivered to Bank of America. These two trustee banks were authorized to cause to be issued new shares to any holder or depositary surrendering bonds or debentures, respectively. The Order further provided in paragraph 54:

> "54. That holders of Certificates of Deposit issued under the Protective Agreement dated December 1, 1931, with respect to bonds, are hereby authorized and directed to surrender certificates of deposit to the Depositary which issued the same and each of said Depositaries under the above-mentioned Protective Agreement is authorized and directed to forward the bonds represented thereby to The Anglo California

National Bank of San Francisco, as Trustee under the Trust Indenture securing said bonds, for cancellation upon the issuance of certificates representing Common stock of the Debtor issuable under said Plan. That each of said depositaries shall certify to said The Anglo California National Bank of San Francisco, as Trustee, the names and addresses of holders of bonds evidenced by such certificates of deposit so surrendered for cancellation and the face amount owned by each such holder. That said Trustee shall notify said Transfer Agent to issue the appropriate number of shares of Common stock issuable under said Plan in the names of such owners and holders and the Transfer Agent shall thereupon issue the same, cause the name of the record owner and holder and the address and number of shares to be entered in its transfer books and such shares to be registered and returned to the Trustee, which shall forward the same to the Depositary from which such bonds were received. That said The Anglo California National Bank of San Francisco, as Trustee, upon the issuance of said shares of stock shall cancel all such bonds as hereinbefore provided."

Paragraph 55 of the Order was applicable with respect to debentures, Bank of America being named as trustee.

It is to be noted that no time limit was provided in the Order for the holders of certificates of deposit to surrender them to the issuing depositary.

Stock certificates representing the new stock were delivered to Anglo Bank and Bank of America. These stock certificates were registered in the name of Anglo Bank and Bank of America as trustee for California Bank as depositary for the benefit of holders of bonds and debentures, respectively. On January 18, 1935, California Bank, one of the depositaries under the Protective Agreements,

forwarded to Anglo Bank all of the bonds and to Bank of America all of the debentures which had theretofore been deposited with it under the Protective Agreements.

On March 23, 1936, the District Court in the reorganization proceedings issued its Final Decree. At that time certain of the bonds and debentures had not been surrendered for cancellation or exchange in accordance with the Order confirming the Plan of Reorganization. The Final Decree provided in part:

> "That it is necessary, equitable and proper that the time be limited within which the owners and holders of said unexchanged securities and stock of the Debtor may surrender the same in exchange for New Common Stock of the Debtor under said Plan of Reorganization, as follows, viz.:
>
> (a) That the owners and holders of such of said First Mortgage 6½% Sinking Fund Gold Bonds of the Debtor as have not heretofore been surrendered for cancellation and exchange for shares of the Debtor's New Common Stock under said Plan of Reorganization, are hereby ordered and directed to surrender said bonds . . . held by them respectively within ten years after the entry of this Final Decree to The Anglo California National Bank of San Francisco, as such Trustee, for cancellation and exchange for the shares of the Debtor's New Common Stock exchangeable under said Plan of Reorganization on account thereof."

The Decree contained a similar provision in reference to the unsurrendered debentures, Bank of America being named as trustee.

The Final Decree further provided in paragraph VIII that upon expiration of the ten-year period all bonds and debentures

". . . which shall not theretofore have been surrendered for cancellation and exchange in accordance with said Plan of Reorganization, said Order Confirming Plan of Reorganization and this Final Decree, shall become absolutely void and all rights and claims of the owners and holders thereof, respectively, shall from and after the expiration of said ten-year period, forever be barred.

"That said The Anglo California National Bank of San Francisco, as such Trustee, and said Bank of America National Trust & Savings Association, as such Trustee, are hereby ordered and directed, upon the expiration of said ten-year period, to forthwith deliver to the Debtor all shares of the Debtor's New Common Stock (including dividend accumulations) then held by them respectively for the benefit of the owners and holders of such of the Debtor's bonds, debentures, . . . as shall not theretofore have been surrendered for exchange. The Debtor, upon receipt from said Trustees or either of them of any of said shares of its New Common Stock, shall forthwith return the same to the status of authorized but unissued shares."

It appears that with respect to certificates of deposit which were surrendered to it, California Bank followed the procedure specified in the Order, and as owners surrendered their certificates of deposit, California Bank instructed the respective trustee banks to cause shares of new common stock to be issued in the names and amounts set forth on a journal report enclosed with the letter of instructions.

Certificates of deposit have never been surrendered by depositors of $3,000 of bonds and $12,000 of debentures which were deposited with California Bank pursuant to the Protective Agreements entered into on December 31, long prior to commencement of the reorganization proceeding. The record shows that the whereabouts of the holders of

these certificates is unknown, but it appears in an affidavit of B. E. Brownell, Vice President, Corporate Trust Division, of California Bank that the efforts of California Bank in this regard have been limited to the writing of letters to the last known address of the certificate holders, that it is believed that the holders of these certificates can be located by incurring the expense of experts in tracing such persons, and that California Bank has not felt that it should incur this expense until it was determined that the certificate holders are entitled to stock.

The banks still hold for exchange certificates representing 768 shares of new common stock. One of the certificates represents a balance of 360 shares delivered to Anglo Bank and the other represents a balance of 408 shares delivered to Bank of America. Both these certificates were delivered to the respective banks as trustee for California Bank as depositary for the bonds and debentures, respectively. Anglo Bank has retained both the bonds and 360 shares of new common stock held by it for exchange for the bonds, together with accumulated dividends thereon. On November 6, 1957, Bank of America returned to California Bank the debentures, together with certificates for 408 shares of new common stock held by it for exchange for the debentures, and accumulated dividends.

Debtor contends that the bonds and debentures represented by the outstanding certificates of deposit have not been "surrendered" for cancellation and exchange and that paragraph VIII of the Final Decree, read with the Plan and Order confirming the Plan, requires the banks to return to Debtor the new stock certificates together with accumulated dividends of $5,045.76.

As noted, California Bank on January 18, 1935, forwarded the bonds to Anglo Bank and the debentures to Bank of

America. The forwarding letter to each bank stated the securities were forwarded pursuant to instructions received from the Protective Committees under the Plan of Reorganization, and that the securities were

> ". . . not to be cancelled or otherwise dealt with except under instructions which we will hereafter send you from time to time. Under such instructions we contemplate requesting that certain of said bonds or debentures with coupons thereto attached be cancelled by you when you can deliver to us the new common stock of Pacific Aggregates, Inc., issued in names and amounts contemplated by the Plan of Reorganization dated October 31, 1936."

We think surrender of the bonds and debentures was thereby accomplished so as to entitle the holders of certificates of deposit to the stock allotted to them under the Plan, and the surrender requirement was thus not applicable to the bonds and debentures involved. It might be pointed out that from the record it does not appear whether the District Court when it entered its Final Decree in 1936 knew that California Bank had forwarded the bonds and debentures to the trustee banks.

Debtor submits that the bonds and debentures were sent to the trustee banks merely for safekeeping and as a matter of convenience, but we think it inescapable that they were forwarded pursuant to the Plan of Reorganization, looking to their subsequent cancellation and issuance of new stock. The Order confirming the Plan provided for surrender of bonds and debentures by "the holder or holders thereof (including, as provided in Section 54 thereof, any Depositary of said bonds) . . ." California Bank was such a depositary.

On surrender of bonds or debentures the trustee banks were to cancel them and cause to be issued and delivered to the holder or depositary certificates evidencing the

proper number of shares of new stock. Although the bonds and debentures in question have not been cancelled and new stock in exchange therefor has not been issued, we hold that such action was not necessary to constitute a surrender for exchange. In our view, the Plan, Order confirming the Plan and Final Decree contemplated as separate acts (1) surrender of the bonds and debentures, (2) cancellation thereof, and (3) issuance of new stock. The fact the latter two acts have not been done does not affect our conclusion that the first, "surrender," has been accomplished. As noted by the District Court, "the physical delivery of the securities was conditioned only upon the giving of future instructions relating to the manner of issuance of the future securities in the names of particular individual owners."

Our conclusion necessarily includes rejection of Debtor's interpretation of the Final Decree as requiring surrender within ten years of certificates of deposit as a condition to receiving new stock. Paragraph VIII of the Final Decree requires surrender within ten years of only the bonds and debentures. Neither the Order confirming the Plan nor the Final Decree specifies any time limit for surrender of the certificates of deposit. The certificates of deposit may well represent the bonds and debentures, but as Debtor concedes, they are nothing more than escrow receipts and not the bonds and debentures themselves, which had been deposited long before under the Protective Agreements of 1931 and delivered to the trustee banks in 1935.

Even if surrender of the certificates of deposit at some time be deemed a condition to the right to receive new stock, it does not follow that surrender of such certificates by the depositors is either a condition to or the equivalent of surrender of the bonds and debentures. Surrender of the bonds and debentures could, and we hold did, occur in dependent of surrender of the certificates of deposit.

It is true that the Order authorizes and directs the holders of certificates of deposit to surrender their certificates to the depositary and that one possible reading of the language of the Order supports the interpretation advanced by Debtor, but we do not think this is a necessary construction. The Order sets out the procedural mechanics for exchange of stock for bonds and debentures, the process to be initiated by surrender of certificates of deposit, but it does not purport to confer any rights on Debtor, which was not a party to the deposit transactions. We do not think that establishment of an orderly procedure clearly designed to facilitate distribution of new stock was meant to impliedly make possible forfeiture of the rights of the holders of certificates of deposit to the end of bestowing a windfall on Debtor and its stockholders.

Whether California Bank as depositary had any duty to deliver the bonds and debentures to the trustee banks is not of concern to Debtor. The important thing is that it was done. Likewise, whether California Bank has any present duty or obligation to the holders of certificates of deposit issued by it is not before us.

Even though there had been no surrender prior to the Final Decree in 1936, it does not necessarily follow that the holders of certificates of deposit would now be barred, as the surrender requirement need not be construed to extend to bonds and debentures that had been previously deposited. It is unnecessary, however, to resolve this question in view of our holding that a surrender of the bonds and debentures took place prior to the Final Decree in 1936, and that the ten-year time limitation thus had no application to the holders of the outstanding certificates of deposit.

The orders of the District Court appealed from are affirmed.

(Endorsed:) Opinion. Filed Nov. 13, 1959.

PAUL P. O'BRIEN, *Clerk*.

United States Court of Appeals for the Ninth Circuit

No. 16280

Pacific Cement and Aggregates, Inc.,
Appellant,
vs.
California Bank, Bank of America N. T. & S. A., and Crocker-Anglo National Bank,
Appellees.

JUDGMENT

Appeal from the United States District Court for the Northern District of California, Southern Division.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the Northern District of California, Southern Division, and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the Orders of the said District Court in this cause be, and hereby are affirmed.

(Endorsed) Judgment. Filed and entered: November 13, 1959.

PAUL P. O'BRIEN, *Clerk*

STATUTES INVOLVED

I. Pertinent Provisions of Section 77B of Bankruptcy Act of 1898, as amended, 48 Stat. 912, 11 U.S.C. § 207 (1934).

"SEC. 77B. CORPORATE REORGANIZATIONS. * * *

"(b) A plan of reorganization within the meaning of this section (1) shall include provisions modifying or altering

the rights of creditors generally, or of any class of them, secured or unsecured, either through the issuance of new securities of any character or otherwise; * * * (9) shall provide adequate means for the execution of the plan, which may include * * * the issuance of securities of * * * the debtor * * * for cash, or in exchange for existing securities, or in satisfaction of claims or rights, or for other appropriate purposes; * * * For all purposes of this section any creditor may act in person, by an attorney at law, or by a duly authorized agent or committee; *Provided*, That the judge shall scrutinize and may disregard any limitations or provisions of any depositary agreements, trust indentures, committee or other authorizations affecting any creditor acting under this section and may enforce an accounting thereunder or restrain the exercise of any power which he finds to be unfair or not consistent with public policy and may limit any claims filed by such committee member or agent, to the actual consideration paid therefor. * * *" [48 Stat. 913-915]

"(f) * * * Upon confirmation of the plan by the judge, the debtor and other corporation or corporations organized or to be organized for the purpose of carrying out the plan, shall have full power and authority to put into effect and carry out the plan and the orders of the judge relative thereto. * * * [48 Stat. 919]

"(g) Upon such confirmation the provisions of the plan and of the order of confirmation shall be binding upon (1) the debtor, (2) all stockholders thereof, including those who have not, as well as those who have, accepted it, and (3) all creditors, secured or unsecured, whether or not affected by the plan, and whether or not their claims shall have been filed, and, if filed, whether or not approved, including creditors who have not, as well as those who have, accepted it. [48 Stat. 920]

"(h) Upon final confirmation of the plan, the debtor and other corporation or corporations organized or to be organized for the purpose of carrying out the plan, shall have full power and authority to, and shall put into effect and carry out the plan and the orders of the judge relative thereto, under and subject to the supervision and control of the judge, and the property dealt with by the plan, when transferred and conveyed by the trustee or trustees to the debtor or the other corporation or corporations provided for by the plan, or if no trustee has been appointed, when retained by the debtor, pursuant to the plan or transferred by it to the other corporation or corporations provided for by the plan, shall be free and clear of all claims of the debtor, its stockholders and creditors, except such as may consistently with the provisions of the plan be reserved in the order confirming the plan or directing such transfer and conveyance or retention, and the court may direct the trustee or trustees, or if there be no trustee, the debtor and any mortgagee, the trustee of any obligation of the debtor, and all other proper and necessary parties, to make any such transfer or conveyance, and may direct the debtor to join in any such transfer or conveyance made by the trustee or trustees. Upon the termination of the proceedings a final decree shall be entered discharging the trustee or trustees, if any, making such provisions as may be equitable, by way of injunction or otherwise, and closing the case. Such final decree shall discharge the debtor from its debts and liabilities, and shall terminate and end all rights and interests of its stockholders, except as provided in the plan or as may be reserved as aforesaid. * * *" [48 Stat. 920.]

II. Pertinent Provisions of the Chandler Act of June 22, 1938, 52 Stat. 883, 11 U.S.C. §§ 501 *et seq.*

"CHAPTER 10.—CORPORATE REORGANIZATIONS * * *

"§604. *Surrender, etc., of claims upon distribution under plan*

"Upon distribution, as provided in section 624 of this title, the judge may, upon notice to all persons affected, fix a time, to expire not sooner than five years after the final decree closing the estate, within which, as provided in the plan or final decree—

"(1) the creditors, other than holders of securities, shall file, assign, transfer, or release their claims; and

"(2) the holders of securities shall present or surrender their securities. After such time no such claim or stock shall participate in the distribution under the plan." [52 Stat. 894.]

"§624. *Effect of confirmation*

"Upon confirmation of a plan—

"(1) the plan and its provisions shall be binding upon the debtor, upon every other corporation issuing securities or acquiring property under the plan, and upon all creditors and stockholders, whether or not such creditors and stockholders are affected by the plan or have accepted it or have filed proofs of their claims or interests and whether or not their claims or interests have been scheduled or allowed or are allowable;

"(2) the debtor and every other corporation organized or to be organized for the purpose of carrying out the plan shall comply with the provisions of the plan and with all orders of the court relative thereto and shall take all action necessary to carry out the plan * * *." [52 Stat. 898]

"§628. *Final decree on consummation of plan*

"Upon the consummation of the plan, the judge shall enter a final decree—

"(1) discharging the debtor from all its debts and liabilities and terminating all rights and interests of stockholders of the debtor, except as provided in the plan or in the order confirming the plan or in the order directing or authorizing the transfer or retention of property;

"(2) discharging the trustee, if any;

"(3) making such provisions by way of injunction or otherwise as may be equitable; and

"(4) closing the estate." [52 Stat. 899]

In the District Court of the United States, Northern District of California, Southern Division

No. 25481-S

In Proceedings for the Reorganization of a Corporation.

In the Matter of

Pacific Coast Aggregates, Inc.,
Debtor.

FINAL DECREE

* * *

VIII.

Limitation of Time Within Which Old Securities and Stock of the Debtor May Be Exchanged

That on February 3, 1936, The Anglo California National Bank of San Francisco, as Trustee, held 37,440 shares of the Debtor's New Common Stock, issued as aforesaid under said Plan of Reorganization, in a master certificate in trust and on reservation for delivery (subject to the provisions of said Plan of Reorganization and said Order Confirming Plan of Reorganization) to the owners and holders of $312,000 principal amount of the Debtor's First Mortgage

6½% Sinking Fund Gold Bonds which on said last-mentioned date had not been surrendered for cancellation and exchange in accordance with said Plan of Reorganization; that on said 3rd day of February, 1936, Bank of America National Trust and Savings Association, as Trustee, held 12,207.12 shares of the Debtor's New Common Stock, issued as aforesaid under said Plan of Reorganization, in master certificates in trust and on reservation for delivery (subject to the provisions of said Plan of Reorganization and said Order Confirming Plan of Reorganization) to the owners and holders of $173,500 principal amount of the Debtor's Ten-Year Sinking Fund 7% Convertible Gold Debentures, 30,313 shares of the Debtor's Convertible Preferred Capital Stock and 82,572 shares of the Debtor's Common Capital Stock without nominal or par value, which on said last-mentioned date had not been surrendered for cancellation and exchange in accordance with said Plan of Reorganization. That it is necessary, equitable and proper that the time be limited within which the owners and holders of said unexchanged securities and stock of the Debtor may surrender the same in exchange for New Common Stock of the Debtor under said Plan of Reorganization, as follows, viz.:

(a) That the owners and holders of such of said First Mortgage 6½% Sinking Fund Gold Bonds of the Debtor as have not heretofore been surrendered for cancellation and exchange for shares of the Debtor's New Common Stock under said Plan of Reorganization, are hereby ordered and directed to surrender said bonds (including all appurtenant unpaid coupons) held by them respectively within ten years after the entry of this Final Decree to The Anglo California National Bank of San Francisco, as such Trustee, for cancellation and exchange for the shares of

the Debtor's New Common Stock exchangeable under said Plan of Reorganization on account thereof.

(b) That the owners and holders of such of said Ten-Year Sinking Fund 7% Convertible Gold Debentures of the Debtor as have not heretofore been surrendered for cancellation and exchange for shares of the Debtor's New Common Stock under said Plan of Reorganization, are hereby ordered and directed to surrender said debentures (including all appurtenant unpaid coupons) held by them respectively within ten years after the entry of this Final Decree to Bank of America National Trust and Savings Association, as such Trustee, for cancellation and exchange for the shares of the Debtor's New Common Stock exchangeable under said Plan of Reorganization on account thereof.

(c) That the owners and holders of such of the shares of said Convertible Preferred Capital Stock of the Debtor as have not heretofore been surrendered for cancellation and exchange for shares of the Debtor's New Common Stock under said Plan of Reorganization, are hereby ordered and directed to surrender said shares held by them respectively within ten years after the entry of this Final Decree to Bank of America National Trust & Savings Association, as such Trustee, for cancellation and exchange for the shares of the Debtor's New Common Stock exchangeable under said Plan of Reorganization on account thereof.

(d) That the owners and holders of such of the shares of said Common Capital Stock of the Debtor without nominal or par value as have not heretofore been surrendered for cancellation and exchange for shares of the Debtor's New Common Stock under said Plan of Reorganization, are hereby ordered and directed to surrender said shares held by them respectively within ten years after the entry of this Final Decree to Bank of America National Trust & Savings Association, as such Trustee, for cancellation and

exchange for the shares of the Debtor's New Common Stock exchangeable under said Plan of Reorganization on account thereof.

That upon the expiration of ten years from and after the entry of this Final Decree all of the Debtor's First Mortgage 6½% Sinking Fund Gold Bonds, Ten-Year Sinking Fund 7% Convertible Gold Debentures, shares of Convertible Preferred Capital Stock and shares of Common Capital Stock without nominal or par value, which shall not theretofore have been surrendered for cancellation and exchange in accordance with said Plan of Reorganization, said Order Confirming Plan of Reorganization and this Final Decree, shall become absolutely void and all rights and claims of the owners and holders thereof, respectively, shall from and after the expiration of said ten-year period, forever be barred.

That said The Anglo California National Bank of San Francisco, as such Trustee, and said Bank of America National Trust & Savings Association, as such Trustee, are hereby ordered and directed, upon the expiration of said ten-year period, to forthwith deliver to the Debtor all shares of the Debtor's New Common Stock (including dividend accumulations) then held by them respectively for the benefit of the owners and holders of such of the Debtor's bonds, debentures, shares of Convertible Preferred Capital Stock and shares of Common Capital Stock without nominal or par value as shall not theretofore have been surrendered for exchange. The Debtor, upon receipt from said Trustees or either of them of any of said shares of its New Common Stock, shall forthwith return the same to the status of authorized but unissued shares.

* * * * *

[Endorsed]: Filed March 23, 1936.